



MEETING DATE: 8/21/06
ITEM NO: 13
ADDENDUM

COUNCIL AGENDA REPORT

DATE: August 15, 2006
TO: MAYOR AND TOWN COUNCIL
FROM: DEBRA J. FIGONE, TOWN MANAGER

SUBJECT: CONSIDER AN APPEAL OF A PLANNING COMMISSION DECISION REGARDING MODIFICATIONS OR REVOCATION OF CONDITIONAL USE PERMIT U-94-44 (GOGUEN'S LAST CALL) FOR THE OPERATION OF A BAR ON PROPERTY ZONED C-2. APN: 529-07-046. PROPERTY LOCATION: 408 N. SANTA CRUZ AVENUE. PROPERTY OWNER: LOS GATOS SHOPPING CENTER, LLC. APPELLANT: CYNTHIA GOGUEN.

REMARK:

The attached information was received after the staff report was completed.

Attachments:

- 1.-11. Previously Submitted
- 12. Fax from Kent G. Washburn dated August 17, 2006 (6 pages).

Distribution:

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123 Jewell Street
SANTA CRUZ, CALIFORNIA 95060

August 17, 2006

Town Council
Town of Los Gatos
110 E. Main St.
Los Gatos, Ca. 95030

Re: Goguen's Last Call

by fax @ 4:00 p.m.

Respected Mayor and Council:

Due to the relatively short notice on which your staff set this matter for hearing I was relieved to learn this morning by telephone from Assistant Director of Planning Randy Tsuda that everything submitted on behalf of my client to the Planning Commission will be automatically included in the agenda packet you receive in preparation for Monday evening's hearing. That saves us a lot of excess copying and you the annoyance of having to wade through unnecessary duplicates.

In this letter I will try to touch on arguments previously made in a way that does not waste your time and instead allows us all to focus on the real issues before you. I will also make some new arguments in response to what I understand the police and planning staff intend to do. As of this writing, despite telephone calls and letters asking for their written presentation, I have nothing, so I am reduced to making educated guesses.

Police Power

It has been settled for decades in California law that a local legislative body such as yours has broad powers to exercise discretion in land use decision making, discretion which courts are reluctant to disturb. They use something termed the "substantial evidence test" and uphold the government body's decision if there is any substantial evidence in the record to support it.

Substantial Vested Rights

The holder of a "substantial vested right," however, which a conditional use permit is, has the right to more deferential treatment. Courts will not just defer to a Council decision, but will instead apply the "independent judgment test" to weigh *all* the evidence and see if a fair result has been reached. Little if any deference to the government decision maker can be expected.

I point this out because I feel that your police and planning staff have set this case up for you as if it were a "substantial evidence test" matter. It isn't. My client holds a long-standing use permit from the Town as has made a very large investment in her business and the license. The law entitles

Attachment 12

her to keep it until the Town can show that the weight of the evidence (as a Superior Court would judge the matter using the above-mentioned independent judgment test) shows that she has violated the terms of the permit and created a public nuisance.

The main point of this letter is to show that while a biased interpretation of the evidence might yield some fractional support for the staff's position, an objective, independent judgment review of the evidence makes it clear that my client has not violated her permit or created a nuisance.

Existing Use Permit

We are all the victims here, my client most especially, of an impermissibly vague, and therefore legally inadequate, existing use permit. It contains a handful of specific conditions all of which my client meets and has met. One – the requirement of providing security if the police so require – she has done for years at peak hours even though the police have never instructed her to do so! In this regard she has gone above and beyond what the use permit requires.

A fair and objective reading of section 1 a. of the use permit, a reading which a judge would surely employ, is that to the extent it is perceived there is a problem with recurrent alcohol-related incidents, the Chief of Police *must* communicate the same to the permit holder, give the owner a chance to resolve them, and then impose an increased security requirement if the owner's efforts do not resolve the problem. In response to direct questioning by the Planning Commission Chief Seaman admitted that this had *never* been done and had *never* been attempted.

Coguens' position

You will note from review of the Planning Commission record that we have always taken the position that my client must operate responsibly. We do not believe that she or anyone else operating under an alcohol license can ask or expect anything else, in Los Gatos or anywhere else.

Despite our firm contention that there had been no showing of justification for a new set of permit conditions, it was our position at the Commission level that we would acquiesce in every suggestion made except one: a reduction of late night business hours. We even agreed to take a careful look at the balance of receipts between late and early hours, but that check revealed that she would gradually go out of business on reduced hours. The existing permit allows my client to remain open until 2:00 a.m., and with a name like the Last Call and a two decade history as the local place for people to get a late nightcap, the only way it can survive is with that market niche.

Town alcohol policy

One of the constraints with which my client and I and the Council must grapple in seeking a reasonable resolution of this matter without a waste of time and expense is the letter and spirit of the Town's alcohol policy. As it was construed by your counsel at the Planning Commission level, I believe, any change in the conditions of the use permit would trigger an automatic reduction in the operating hours. Some of the Commissioners seemed to feel a sense of constraint to literally follow this interpretation at their level and leave the possibility of a different interpretation or application to your discretion.

Goguen's recommendation

Our recommendation for resolving this problem and giving the Town a clear-cut and *mutually agreed* avenue of effective enforcement is through conditions 1 b and c of the existing use permit. These terms in my opinion give room for the police, in conjunction with their express duties to require and oversee employee training and performance, to impose the kind of conditions of operation that the Planning Commission considered reasonable. We would propose to sign agreeing to operate by those conditions in substantially the form the Commission approved except for the earlier closing.

Coupled with that we propose an express enforcement agreement with the Town stating that a material failure by Goguen's to meet the objective criteria in such standards would be grounds for revocation. It has been called by various terms, but people seemed to think that the title "last chance agreement for the Last Call" had a certain cachet.

The third and final main feature of our proposal would be that you continue this hearing open for a time certain, whether shorter or longer, to see if Goguen's actually is performing to the defined standards. If it does it should survive; if it doesn't it should end.

We proposed this set of terms not because we think my client guilty or because we believed that a court would impose it against Goguens' will. We proposed it demonstrate as clearly as we could while staying open for business that this is a responsible operator willing to be held to account so long as there are objective criteria.

Objective analysis shows planning staff and police are giving biased and false testimony.

The alternative to giving Goguen's a chance to perform under its existing permit and be judged by clear, fair and objective analysis of the evidence according to clearly stated and objective criteria will be to engage in a very pointed and unpleasant inquiry into not only the misinterpretation and falsification of the evidence against Goguen's, but also the likely reasons why.

I feel constrained not to put that latter contention as to the underlying reasons in writing at this time because I think it will be such a unpleasant and difficult inquiry to conduct. Obviously we will so state at the hearing if need be.

I prefer instead to point out the glaring holes in the substance and procedure of what the Town police and planning staff members are doing to Goguen's by means of police reports.

1. Sheer number of supposed calls - At the Commission level both planners and police officers repeatedly sought to use the sheer number of supposed calls to the Last Call as evidence of wrongdoing and the existence of a nuisance. I and others pointed out some of the absurdities in such contentions and demanded access to the reports to see what they really said. Some commissioners seemed to realize that there was a certain amount of staff gulling behind the waving around of those numbers; others didn't and seemed to have been so prejudiced by it we could not overcome the prejudice without access to the reports to demonstrate that they are almost all innocuous and show little if any evidence of any fault by Goguen's.

Since the transcripts and the documentary record of the Commission process is being

transmitted to you at this time; the same overstated, highly prejudicial figures necessarily will be part of the evidence you consider. We are entitled to and demand once again the opportunity to obtain copies of these reports, redacted if necessary to protect privacy, etc. so as to prove my client's innocence. We are more than willing to do the work to analyze the reports and present the written results to you so that you can see the police reports show that Goguen's is not now a nuisance.

2. The true question is this: Is Goguen's *NOW* a nuisance or in violation of the permit?

Staff and the landlord or his favorite witnesses will want to try to distract you into thinking about and deciding a question that is not really before you. That question would be this: did Goguen's or its patrons ever make any mistakes in the last six years?

If they can distract you into focusing on that question then they can hope for an adverse result. If instead you focus on the real and only question lawfully before you, "Is Goguen's *now* in violation or *now* a nuisance?" the decision must be for us.

I focus on the present because if a nuisance ever existed, and we do not believe it ever did because until the landlord, Mr. Zanardi, lost his eviction in March and had to pay the better part of ten thousand dollars in attorneys fees, there was never the slightest peep from any representative of the Town whatsoever that there might be a problem, let alone of nuisance proportions, a nuisance that has already been cured and no longer exists cannot form the basis for a revocation. You must focus on the present and, we would agree, on any unbroken chain of events that stretches from the past to the present.

In doing so, however, you should be guided by the express testimony of Captain Alana Forrest in the June 14 session of the Planning Commission. There she testified at about page ten of the transcript that a reduction of serious incidents at others bars in response to police demands was perfectly OK with the police. In order to avoid a charge of unlawful discrimination against my client as a woman bar owner, therefore the same standard of working for reduction rather than prosecuting as a nuisance, must be applied.

3. Captain Forrest falsely testified that Goguen's incidents have increased or stayed level

Staff tells me you will be receiving a small selection of police reports that the chief will be relying on to advocate for revocation on August 21. We have been given such a set of reports. By Monday I will have a chart to show you on the projector that dissects these reports in detail.

For the moment I want to focus on just one feature of what these reports reveal in stark contrast to Captain Forrest's allegations. At pages 8 to 11 of the June 14 transcript you can read that she told the Commission that unlike other bars which were worthy of police cooperation and fair treatment because in response to police contacts they reduce the level of service calls, Goguen's was on track for a hypothetical total of 24 serious incidents for 2006.

If that is true, and the reports produced are the ones which *supposedly* form the basis for the Chief's conclusion that Goguen's is a *presently existing* nuisance, why have the police produced only two reports for *all of 2006 to date!* And why do those two reports show no fault on the part of the Last Call or its employees?

These are of course rhetorical questions. The reason that no other reports have been produced and the two produced are not damning to the Last Call is because the evidence does not back up what Captain Forrest told the Planning Commission.

4. The police admit to making no effort to a) communicate or b) work with Goguen's.

Let's look at another startling fact: it took direct admonitions to other bar owners and repeated meetings between the police and their staffs to achieve even the gradual reduction in incidents which the police chief and captain subjectively find satisfactory in those bars' numbers. In response to repeated questions from the Commission the police admitted to not even trying this successful program with Goguen's because they didn't think my client would "cooperate." This is unequal treatment.

The startling fact: even in the absence of *any police effort or cooperation whatsoever* in a call reduction program for Goguen's, there has been a night and day difference in serious call figures and the contents of the reports as to Goguen's since my client learned of the surreptitious drug sales in 2004. New vigilance on her part, better personnel and security measures, and employee training have markedly reduced the number and magnitude of calls at Goguen's.

I will present you with a chart on Monday evening that shows the line of demarcation in 2004 and documents for you that the last two years of Last Call operations have more than met the standards that the police apply to other establishments. The only possible reason for misstating the evidence as to my client and applying a different standard is the kind of bias I am reluctant to publicly charge. If you look at the evidence objectively instead of simply rubber stamping your planning and law enforcement staff, I respectfully submit the only objective conclusion, the conclusion that a Superior Court applying the "independent judgment test" would reach, is that Goguen's is not now a nuisance.

5. There is a lot more evidence of planning and police bias.

a. Captain Forrest testified with no evidentiary support whatsoever to the absurd belief that local teenagers were asking transients to illegally buy them high priced single drinks from Goguen's instead of in bulk at the liquor store next door. There is not one single shred of evidence that this ever happened or that the teens of Los Gatos are that careless with money.

b. The staff seems eager to blame Goguen's for broader social problems that the Town has totally apart from Goguen's and which have no logical nexus with Goguen's.

- i. Litter in the nearby Town parking lot. The evidence showed that it was Safeway and fast food litter or alcohol containers. Goguen's sells no food and no alcohol for takeout. The staff photos showed a neat, orderly trash are behind Goguen's.
- ii. Lack of a coherent and effective policy for dealing with mentally ill transients. We all know, and the evidence all shows, that these people live in the bushes by the trail and go to Safeway to shop and or buy alcohol, not Goguen's. We also all know that they adversely affect businesses in the nicer part of downtown Los Gatos on the other side of Highway 9 and are not allowed to congregate there.

- iii. Lack of lighting in the Town parking lot behind Goguen's. By contrast my client immediately after the Commission hearing had a new security light put on the back of her premises. I do not know if the Town has done anything yet.
- iv. Staff blames public urination by the transients in the Town parking lot on Goguen's while claiming that they are Goguen's customers. The first absurdity in this charge is that the transients smell and behave badly and drive away other customers. They are not welcome in the Last Call. And if they were they would be allowed to make their last toilet calls there and there would be no public urination problem. The public urination is no fault of Goguen's.

Conclusion

Perhaps that is a good note on which to wrap up this discussion. We have not been given access by the Town officials to the evidence that will fully exonerate my client despite the ostensible use of and reference to that very evidence by the police to justify their failure to work with Goguen's.

We deserve a level playing field. We are willing to help define and then be held to criteria as strict and clear as, if not more than, the criteria other Los Gatos establishments are required to meet.

We are not asking for any exemption from the rule of law and good sense. Instead we are petitioning you to apply law and good sense to this situation instead of the biased and contrived arguments that are being presented against us.

There is a certain cynicism about the exercise of government power embodied in sayings like "you can't fight City Hall." We don't want to fight it or to escape the legitimate exercise of Town Hall power. We are standing up for the kind of equal and unbiased treatment that vindicates the powers you hold and increases public confidence that both civil and criminal law enforcement in this Town are fair and unbiased. By making a fair analysis of the facts and treating Goguen's as everyone else is treated you will only enhance and solidify the proper rule of law in your Town.

Very truly yours,



Kent G. Washburn